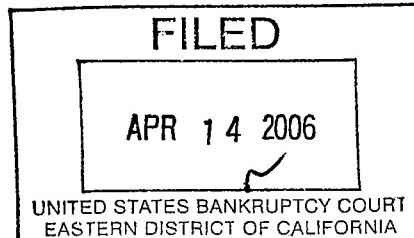


UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

3 In re \_\_\_\_\_ ) Case No. 04-15726-B-13

4 George S. Jercich, } DC No. DRJ-3  
5 Debtor. } DC No. DRJ-4 } DC No. MNE-1

7 James A. Petralia; John L. Fagundes,  
Andrew L. Fagundes and Theresa  
8 Fagundes; and M. Nelson Enmark,  
Chapter 13 Trustee,  
9



**AMENDED MEMORANDUM DECISION RE MOTION TO CONFIRM,  
SECOND CHAPTER 13 PLAN AND TRUSTEE'S MOTION TO DISMISS<sup>1</sup>**

13 David R. Jenkins, Esq. appeared on behalf of the debtor, George S. Jercich (the "Debtor").

14 M. Nelson Enmark, Esq. appeared as the chapter 13 trustee (the "Trustee").

15 Thomas R. Duffy, Esq. of Duffy & Guenther, LLP appeared telephonically on behalf of objecting creditor, James A. Petralia ("Petralia").

17 Craig Fry, Esq. of Lang, Richert & Patch appeared on behalf of objecting creditors John L. Fagundes, Andrew L. Fagundes and Theresa Fagundes (collectively "Fagundes").

18 This matter comes before the court on the Debtor’s motion to confirm a second amended  
19 chapter 13 plan (the “Second Amended Plan” or “Plan”). Petralia objects to confirmation on the  
20 grounds, *inter alia*, that (1) the Debtor is not eligible for chapter 13 relief, and (2) the Second  
21 Amended Plan does not meet the requirements for confirmation under 11 U.S.C. §§ 1325(a)(4)

<sup>24</sup> <sup>1</sup>The court's Memorandum Decision Re Motion to Confirm Second Amended Chapter 13  
25 Plan and Trustee's Motion to Dismiss was filed on February 28, 2006. Based thereon, the court  
26 denied confirmation of the second amended plan and dismissed the bankruptcy case. This  
27 Amended Memorandum Decision is filed in response to the Debtor's Motion to Amend Findings  
28 of Fact which was heard on April 13, 2006 (the "Motion to Modify"). By separate order, the  
Motion to Modify was granted in part, as reflected herein. The court's ruling denying  
confirmation and dismissing the case remains unchanged.

1 and (a)(6).<sup>2</sup> The Trustee moves to dismiss on the grounds that the Debtor has not established a  
2 regular income and cannot fund a feasible plan. The dispute over the Debtor's ability to fund a  
3 chapter 13 plan also raises a question whether the Second Amended Plan has been proposed in  
4 good faith (§ 1325(a)(3)) and represents the Debtor's "best efforts" to pay his unsecured debts.  
5 § 1325(b). For the reasons set forth below, confirmation of the Second Amended Plan will be  
6 denied and the case will be dismissed.

7 The court has jurisdiction over this matter under 28 U.S.C. § 1334 and 11 U.S.C.  
8 §§ 109(e) and 1325. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) & (L). This  
9 memorandum decision contains findings of fact and conclusions of law required by  
10 Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

11 **Findings of Fact.**

12 **Background.**

13 The Debtor filed this petition under chapter 13 on July 1, 2004. Just days before, at the  
14 case management conference, the court dismissed a case he had filed *in propria persona* under  
15 chapter 11 (Case No. 04-13741: the "Prior Chapter 11"). The Debtor had previously been  
16 through chapter 7 in a case filed in 1986 in the Northern District of California (Case No. 586-  
17 02611-ASW: the "Prior Chapter 7").

18 Debtor owns 46.42 acres of real property in the local foothills (the "Property"). The  
19 schedules filed in the Prior Chapter 11 describe the Debtor's interest in the Property as "100%  
20 owner in joint tenancy with wife Mary E. Jercich." The schedules filed in this chapter 13 list the  
21 Property as "community property" and indicate the Debtor is "separated," but there is no  
22 evidence that the Property has been divided in a dissolution action. In the Motion to Modify, the  
23 Debtor contends again that the Property is community property and thus would be property of the  
24 bankruptcy estate. The Debtor's spouse has not participated in these proceedings, or asserted any  
25 interest in the Property.

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26  
27       <sup>2</sup>Unless otherwise stated, all references and symbols referring to the Code, section or  
28 sections refers to the United States Bankruptcy Code 11 U.S.C. § 101, et seq., applicable to  
cases filed before October 17, 2005.

1       The Debtor's Schedule C claims a \$150,000 homestead exemption for the Property under  
2 CCP § 704.730(a)(3). That exemption is only available if the Debtor, or a spouse residing in the  
3 homestead, is over the age of 65 and/or disabled. By subsequent evidence in support of the  
4 Motion to Modify, the Debtor has shown that he was over 65 years' old when the petition was  
5 filed and no party in interest has objected to the exemption. The court therefore assumes for  
6 purposes of this analysis, that the exemption would be allowed if the Debtor filed a chapter 7 and  
7 the Property were liquidated subject to the oversight of a chapter 7 trustee.

8       The Debtor has yet to confirm a chapter 13 plan in this case. Petralia objected to  
9 confirmation of the Debtor's initial plan, and that plan was withdrawn before the confirmation  
10 hearing. The Debtor filed a first amended chapter 13 plan (the "First Amended Plan") which  
11 proposed to pay 10% of the general unsecured claims with irregular payments ranging from \$950  
12 per month to \$3,000 per month. Petralia and Fagundes both objected to confirmation of the First  
13 Amended Plan. They argued that the First Amended Plan was not feasible and that Debtor was  
14 not eligible for chapter 13 because he had not established a "regular income" as required in  
15 § 109(e). The Trustee likewise objected to the First Amended Plan on the ground that the plan  
16 was underfunded. The court set that matter for trial, but the trial date was vacated and  
17 confirmation was denied on June 16, 2005, because the Debtor failed to comply with the court's  
18 pre-trial order. Based on the record, the court found that the First Amended Plan was not feasible  
19 under § 1325(a)(6); the Debtor's Schedules I and J showed that the Debtor did not have enough  
20 disposable income (\$1,867) to make the required payments. The court continued the Trustee's  
21 dismissal motion to allow the Debtor an opportunity to propose another plan.

22       The Debtor filed his Second Amended Plan on August 15, 2005. In the Second Amended  
23 Plan, the Debtor proposes to pay 9% of the general unsecured claims. Based on the estimated  
24 amount of unsecured claims (\$265,000), the Debtor is proposing to distribute not more than  
25 \$23,850 to his unsecured creditors. The schedules list \$52,000 of priority claims, which  
26 theoretically would have to be paid before the unsecured creditors, but only one priority claim  
27 has actually been filed by the Internal Revenue Service in the amount of \$5,000. The Second  
28 Amended Plan is funded through an irregular payment scheme over a term of 60 months, starting

1 at \$1,230 per month and increasing to \$3,530 per month. On October 12, 2005, the Debtor filed  
2 a declaration which included amended Schedules I and J.<sup>3</sup> These documents were prepared to  
3 show a gross business income of \$4,705.56 and an increase in the Debtor's disposable income to  
4 \$2,750 based on "actual performance for the period from January 1, 2005, to October 1, 2005."

## 5 | Value of the Property.

The record is inconsistent with regard to valuation of the Property. In the Prior Chapter 11 schedules, the Debtor valued the Property at \$312,500. In the initial chapter 13 schedules, he valued the Property at \$625,000. Those schedules were subsequently amended to drop the value to \$500,000. The Debtor later testified in a deposition that the value of the Property could be between \$625,000 and \$720,000, and potentially \$975,000 if subdivided. None of these valuations are supported by an appraisal. The Debtor contends, in a subsequent declaration, that subdivision of the Property at this time is not practicable and that the value of the Property is \$500,000. For purposes of this analysis, the court will assume without making a finding, that the Property has a fair market value of \$500,000. The Fagundes creditors filed a claim against the Debtor in the amount of \$136,835 secured by a lien against the Property. The schedules list another lien held by Robert Foley in the amount of \$125,000. Robert Foley has not filed a proof of claim setting forth the balance due on this obligation and the Second Amended Plan states that the Debtor is making monthly payments to Mr. Foley, outside of the Plan. For purposes of this decision, the court will therefore accept the Debtor's statement regarding the amount of this lien. No other secured claims against the Property are scheduled. As discussed above, the Debtor claimed a \$150,000 exemption against the Property. Based on the valuation and the liens stated in the amended chapter 13 schedules, there does appear to be non-exempt equity in the Property of approximately \$88,000.

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1 **Debtor's Income.**

2       The Debtor is self-employed and operates a business from which, he contends, the money  
3 will come to fund his chapter 13 plan. His business involves the collection of rocks from the  
4 Property and sale of the rocks to landscapers (the "Rock Business"). The record from which the  
5 court must determine whether the Debtor has both "regular income" and sufficient "disposable  
6 income" to fund a chapter 13 plan is ambiguous and conflicting as illustrated by the following  
7 chronology. Looking first to the Prior Chapter 11, the Debtor's Schedule I filed in May 2004,  
8 stated that the "regular income from operation of business or profession" was "NONE NOW -  
9 Hopefully \$10,000 monthly in 3 months." At that time, the Debtor received only his Social  
10 Security in the amount of \$750 per month, against monthly expenses of \$4,000. At a hearing on  
11 June 9, 2004, the Debtor explained on the record why he had filed for relief under chapter 11,  
12 and not under chapter 13:

13           THE COURT: Why is this in Chapter 11? Did you not qualify to be in Chapter 13?

14           THE DEBTOR [JERCICH]: That's correct, your Honor.

15           THE COURT: What, too much debt, is that -

16           THE DEBTOR: No, I'm not a wage earner.

17           THE COURT: How are you going to confirm a Chapter 11 plan if you don't have -- you  
18           don't have any income?

19           THE DEBTOR: I hope to have income. I -- I finally made a little bit here this last week.

20           Soon thereafter, the Prior Chapter 11 was dismissed and the Debtor refiled this case under  
21 chapter 13. The chapter 13 schedules are highly inconsistent with the chapter 11 schedules and  
22 the Debtor's prior statements in the court. The chapter 13 schedule of business income and  
23 expenses listed a business income of \$225,000 for the 12 months prior to filing (July 2003 – July  
24 2004). The Debtor's Schedules I and J state that his "regular income from operation of business  
25 or profession" was \$7,500 per month (\$90,000 per year). A declaration filed in support of  
26 confirmation states that the Debtor also has income from "my job as a manufactured home sales  
27 person." However, a subsequent brief filed by the Debtor indicates that this employment had  
28 terminated and that the income actually realized from this endeavor was minimal. The Debtor

1 declared in his declaration of October 12, 2005, that he had disposable income to fund a chapter  
2 13 plan in the amount of \$2,750. Unfortunately, even that amount is inadequate to fund the  
3 Second Amended Plan, which requires payments up to \$3,530 per month.

4 In support of his objection, Petralia lodged a copy of the Debtor's 2004 federal income  
5 tax return, dated October 2005. That document paints yet another picture of the Debtor's income  
6 situation. The Debtor reported gross receipts and sales from his Rock Business of \$41,069 for  
7 the entire 2004 tax year, substantially less than the income projection in Schedule I. He also  
8 reported a net loss from operation of the business in excess of \$6,000 and an adjustable gross  
9 income in the *negative* amount of \$5,553 for 2004.<sup>4</sup>

10 **Petralia's Objection.**

11 Petralia is a former employee of the Debtor who obtained a judgment in State court for  
12 damages based on willful and malicious injury. After lengthy litigation, Petralia's judgment was  
13 determined to be nondischargeable in the Prior Chapter 7. Petralia filed a proof of claim stating  
14 the amount of the judgment, with post-petition interest, to be \$107,105. The Debtor disputes the  
15 amount of this claim, but has not filed a formal objection to the claim. For purposes of this  
16 analysis, Petralia's claim is presumptively valid and deemed allowed. § 502(a), Fed.R.Bankr.P.  
17 3001(f).

18 Petralia again objects to confirmation of the Second Amended Plan on the ground that the  
19 Debtor does not have a "regular income" and is not eligible to be in chapter 13 under § 109(e).  
20 Petralia objects under § 1325(a)(6), on the ground that the Debtor cannot fund a confirmable  
21 chapter 13 plan. Petralia also objects under § 1325(a)(4), on the ground that the Second  
22 Amended Plan would not pay unsecured creditors the amount they would receive from  
23 liquidation of the Property in a chapter 7. After first indicating that they did not oppose  
24 confirmation, the Fagundes creditors joined in Petralia's objection.

25 In response, the Debtor conceded that he has not yet established "the income he is capable

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27           <sup>4</sup>The net income figures include deductions for depreciation and mortgage debt totaling  
28 approximately \$19,000. The record is unclear as to how these deductions might actually affect  
the Debtor's cash flow situation and his ability to service the payments under a chapter 13 plan.

1 of developing from his rock business" because he has been engaged in State court litigation and  
2 he was seriously injured in an accident in July 2005. He describes the Rock Business as  
3 "fledgling." He projects, "he can significantly increase the income over the income he has made  
4 since his plan began, provided he can dedicate near full-time or full time to his business."

5 In late October 2005, Petralia attempted to depose the Debtor and requested the  
6 production of documents relevant to, *inter alia*, the Debtor's assets and income producing ability.  
7 The results of that discovery effort, as summarized in the Supplemental Declaration of Thomas  
8 R. Duffy filed November 7, 2005, suggest that many questions remain unanswered regarding the  
9 Debtor's financial condition. The Debtor failed to produce requested financial records and he  
10 was unable to answer numerous relevant questions regarding, *inter alia*, the nature of the Rock  
11 Business and the source of the reported income.

12 **Issues Presented.**

13 Petralia asserts that the Debtor is not eligible for chapter 13 relief under § 109(e) and that  
14 the Second Amended Plan does not meet the requirements for confirmation under § 1325(a).  
15 The Debtor responds that he has the ability to earn a regular income from the Rock Business in  
16 the future. Petralia also argues that the Second Amended Plan does not pay enough to the  
17 unsecured creditors based, *inter alia*, on the liquidation value of the Property. The Debtor's  
18 response to this issue is equivocal and inconclusive. Petralia's objection also forces an  
19 examination of the "Best Efforts Test" under § 1325(b).

20 The threshold issue, therefore, is whether the Second Amended Plan is confirmable under  
21 §§ 1325(a)(4) and 1325(a)(6). A secondary issue is whether the Debtor is even eligible to be a  
22 chapter 13 debtor under § 109(e); *i.e.*, does he have a "regular income" sufficient to fund a  
23 confirmable chapter 13 plan. The omissions and inconsistencies in the record, coupled with the  
24 Debtor's unwillingness or inability to respond to Petralia's discovery effort, and his inability to  
25 commit to any level of disposable income, also gives rise to his good faith. § 1325(a)(3).

26 **Analysis and Conclusions of Law.**

27 **Applicable Law and Burden of Proof.**

28 The analysis of this case begins with a review of the applicable statutes. Chapter 13 relief

1 is not available to everyone. Section 109(e) defines who may be a debtor in chapter 13 as:

2       (e) ***Only an individual with regular income*** that owes, on the date of the filing of the  
 3 petition, noncontingent, liquidated, unsecured debts of less than \$307,675 and  
 4 noncontingent, liquidated, secured debts of less than \$922,975 . . . may be a debtor under  
 chapter 13 of this title. (Emphasis added.)

5       Section 1325(a) sets forth certain elements which must be established to confirm a  
 chapter 13 plan which include:

6       (a) Except as provided in subsection (b), the court shall confirm a plan if–  
 7                  ...  
 8                  (3) the plan has been ***proposed in good faith*** and not by any means forbidden by  
 9 law;  
 10                 (4) the value, as of the effective date of the plan, of property to be distributed  
 11 under the plan on account of each allowed unsecured claim is ***not less than the***  
 12 ***amount that would be paid on such claim if the estate of the debtor were***  
 13 ***liquidated under chapter 7*** of this title on such date;  
 14                  ...  
 15                 (6) the debtor will be ***able to make all payments*** under the plan and to comply  
 16 with the plan; (Emphasis added.)

15       If the trustee or the holder of an allowed unsecured claim objects to confirmation of the  
 16 plan, then the plan must also satisfy the requirements of § 1325(b)(1), including:

17       (A) the value of the property to be distributed under the plan on account of such  
 18 claim is not less than the amount of such claim; or  
 19       (B) the plan provides that all ***of the debtor's projected disposable income*** to be  
 20 received in the three-year period beginning on the date that the first payment is  
 due under the plan ***will be applied to make payments under the plan.*** (Emphasis added.)

21       Section 1322(a)(1) sets forth certain required contents of a chapter 13 plan:

22       (a) The plan shall–

23               (1) ***provide for the submission of all or such portion of future earnings or***  
 24 ***other future income of the debtor to the supervision and control of the trustee as is***  
***necessary for the execution of the plan.*** (Emphasis added.)

25       The Debtor has the burden of proof on all elements for confirmation of the Second

26 Amended Plan. *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 883 (9<sup>th</sup> Cir. BAP 2002). Under Federal  
 27 Rule of Civil Procedure 43(e), the Debtor must produce evidence in support of his motion when  
 28 the facts do not appear of record.

1   **Eligibility: The Debtor Has Not Established That He Has “Regular Income” Within the**  
 2   **Meaning of § 109(e).**

3                 Chapter 13 eligibility is properly considered when raised in a confirmation proceeding.  
 4   *In re Nichols*, 184 B.R. 82, 87 (9<sup>th</sup> Cir. BAP 1995). To be eligible for relief under chapter 13,  
 5 one must be “an individual with regular income.” § 109(e). The term “individual with regular  
 6 income,” is defined in the Code as an “individual whose income is sufficiently stable and regular  
 7 to enable such individual to ***make payments under a plan*** under chapter 13 . . .” (Emphasis  
 8 added.) § 101(30). There must be some factual basis for the court to determine the regularity  
 9 and stability of the debtor's income. *In re Mozer*, 1 B.R. 350 (Bankr. D.Col.1979). A  
 10 determination of what constitutes “regular income” is not limited to the date of filing the petition,  
 11 but may properly be viewed prospectively. *In re Tucker*, 34 B.R. 257, 262 (Bankr. W.D. Okla.  
 12 1983).

13                 Petralia argues that Debtor does not have a regular income sufficient to fund the Second  
 14 Amended Plan. The Debtor responds that he can earn the income necessary to fund the Plan, as  
 15 evidenced by the fact that he has been making the payments required by the unconfirmed Plan to  
 16 date. The court is satisfied that the Debtor can generate some income on a regular basis because  
 17 he has been making payments to the Trustee. However, that is not the same as “regular income”  
 18 as defined by the Code. The Debtor’s argument begs the questions; does the Second Amended  
 19 Plan pay enough to the creditors in its present form and, if not, does he have enough “regular  
 20 income” to fund a confirmable plan?

21                 For the reasons set forth below, the court is not persuaded that the Second Amended Plan  
 22 is confirmable in its present form. The record does not show that the Debtor even has the ability  
 23 to fund the escalating payments required by the Plan at its present funding level, without regard  
 24 to any additional payments that may be required to pass confirmation. The only logical  
 25 conclusion is that the Debtor does not have “regular income” as defined in § 101(30). The court,  
 26 therefore, is not persuaded that the Debtor is eligible for relief under chapter 13. See *In re*  
 27 *Nosker*, 267 B.R. 555, 560 (Bankr. S.D. Ohio 2001) (denying confirmation and dismissing case  
 28 where the debtor failed to provide credible information concerning his income).

1    **The Debtor Has Not Established that the Second Amended Plan Satisfies the Chapter 7**  
2    **Liquidation Test.**

3              Section 1325(a)(4) requires that a chapter 13 plan pay to unsecured creditors no less than  
4 what they would receive in a chapter 7 liquidation. Petralia contends that the Debtor is not  
5 paying an amount equal to the non-exempt equity in the Property. The Debtor responds with  
6 arguments about the various values he has given for the Property, but his arguments are not  
7 evidence and the Debtor has the burden of proof on this issue. Petralia's objection is well taken.

8              As discussed above, the court presumes for purposes of this analysis, that the Debtor  
9 would get to keep the claimed homestead exemption over the objection of a chapter 7 trustee and  
10 the court has presumed a value for the Property as stated in the amended schedules, \$500,000.  
11 However, based on this value, the unsecured creditors could receive as much as \$80,000 from  
12 liquidation of the Property after payment of the priority claim and costs of administration, even  
13 after allowance of the stated exemption. This is substantially more than 9% of their claims.  
14 Accordingly, the court cannot find that the Second Amended Plan complies with § 1325(a)(4).

15    **Good Faith and the Best Efforts Test.**

16              11 U.S.C. § 1325(b) is euphemistically referred to as the "Best Efforts Test." It applies  
17 when the trustee or the holder of an allowed unsecured claim objects to confirmation of the  
18 chapter 13 plan. The Best Efforts Test prohibits confirmation of a plan unless either (1) the  
19 objecting creditor's claim will be fully paid, or (2) all of the debtor's projected disposable  
20 income will be applied to plan payments for at least three years. Section 1325(a)(3) requires that  
21 a chapter 13 plan be proposed in good faith. "The bankruptcy court has an independent duty to  
22 determine that a chapter 13 plan was filed in good faith." *Villanueva v. Dowell (In re  
23 Villanueva)*, 274 B.R. 836, 841 (9<sup>th</sup> Cir. BAP 2002). Here, these two concepts are inextricably  
24 intertwined and the Debtor has the burden of proof on both.

25              The "good faith" inquiry under § 1325(a)(3) requires the court to consider the totality of  
26 the circumstances, "the underlying focus being whether the debtor has acted equitably in  
27 proposing his plan." *Villanueva* at 841, citing *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390  
28 (9<sup>th</sup> Cir. 1982). "The court should examine the debtor's intentions and the legal effect of

1 confirmation in light of the spirit and purposes of chapter 13.” *Villanueva* at 841, citing  
2 *Chinichian v. Campolougo (In re Chinichian)*, 784 F.2d 1440, 1444 (9<sup>th</sup> Cir. 1986). Factors to be  
3 considered in determining good faith include, but are not limited to:

- 4 (1) The amount of the proposed payments and the amounts of the debtor’s surplus;
- 5 (2) The debtor’s employment history, ability to earn, and likelihood of future increases in  
income;
- 6 (3) the probable or expected duration of the plan;
- 7 (4) the accuracy of the plan’s statements of the debts, expenses and percentage of  
repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the  
court;
- 8 (5) The extent of preferential treatment between classes of creditors;
- 9 (6) The extent to which secured claims are modified;
- 10 (7) The type of debt sought to be discharged, and whether any such debt is dischargeable  
in Chapter 7;
- 11 (8) The existence of special circumstances such as inordinate medical expenses;
- 12 (9) The frequency with which the debtor has sought relief under the Bankruptcy [Code];
- 13 (10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
- 14 (11) The burden which the plan’s administration would place upon the trustee.

15 *Villanueva* at 841, citing *Fid. & Cas. Co. of N.Y. v. Warren (In re Warren)*, 89 B.R. 87, 88 n.1  
16 (9<sup>th</sup> Cir. BAP 1988).

17 The Second Amended Plan proposes to discharge virtually all (91%) of the unsecured  
18 claims, including Petralia’s claim, which has already been adjudicated as non-dischargeable in  
19 the Prior Chapter 7. The Best Efforts Test therefore requires the Debtor to prove that all of his  
20 projected disposable income is being used to fund the Plan. The problem here is that the court  
21 has no basis to determine, or even estimate, what the Debtor’s projected disposable income is, or  
22 will be. The record with regard to the Debtor’s assets, employment history, ability to earn  
23 income, likelihood of future increases in income, and overall financial condition is a veritable  
24 moving target. Petralia tried, apparently in good faith, to conduct discovery regarding the  
25 Debtor’s financial condition, but the Debtor appears to be “hiding the cards” with regard to his  
26 assets and his true financial condition. The Debtor seeks equitable relief from this court, but the

1 court is not persuaded that the Debtor has acted equitably and in good faith with regard to his  
2 creditors, and particularly Petralia.

3       The Debtor argues in the Motion to Modify that the Second Amended Plan is his “best  
4 effort” based on his age, health, and employment prospects. He promises that he can work hard  
5 enough and develop the ability to fund the Second Amended Plan, but as discussed above, he has  
6 not established how much will be needed to satisfy § 1325(a)(4). The Debtor contends that the  
7 income from his Rock Business is improving. As a sign of good faith, the Debtor offers in the  
8 Motion to Modify to have his income situation periodically reviewed by the Trustee, who could  
9 then bring a motion to increase the distribution to unsecured creditors if the income is available.  
10 The problem with this proposal is two-fold. First, at the commencement of this case, the Debtor  
11 did not have sufficient disposable income to support his chapter 13 plan, and there is no authority  
12 for the proposition that a “periodic review” will overcome a creditor’s objection under  
13 §§ 1325(a)(6) & (b). Second, once the court confirms a plan, which provides for less than full  
14 payment of all claims, the plan payment will be essentially fixed. Thereafter, the Debtor will  
15 retain complete discretion and control over his efforts to generate the income required to perform  
16 the Plan, without ever having to show the court, or the Trustee how much disposable income he  
17 actually can earn. In other words, the Debtor can choose to only work hard enough to make the  
18 minimum plan payments. The Debtor obviously doesn’t intend to earn enough income to pay the  
19 unsecured claims in full, so the concept of a “periodic review” is illusionary. Again, the Debtor  
20 had the burden of proof on these issues and the court is not persuaded from the record before it  
21 that §§ 1325(a)(3) and 1325(b) have been satisfied.

22 **Dismissal of the Chapter 13 Case.**

23       The Trustee moves to dismiss this case based upon the Debtor’s failure to establish an  
24 ongoing stream of income sufficient to fund a confirmable plan. The court agrees. Although this  
25 case has been pending for over a year and a half, the Debtor has been unable to propose a  
26 confirmable plan, or to establish that he has a “regular income” sufficient to fund such a plan.  
27 Given the Debtor’s apparent unwillingness to come forward with a candid and complete  
28 disclosure in response to Petralia’s discovery efforts focused on his financial affairs, the court

1 sees no point in granting the Debtor more time to file yet another chapter 13 plan. Anything less  
2 than a firm commitment, and proof of ability, to pay Petralia's claim in full will precipitate the  
3 same round of objections and issues raised here. The Debtor's inability to confirm a plan,  
4 coupled with the denial of more time to file another plan, is cause for dismissal under §  
5 1307(c)(5). Based thereon, the court is persuaded that the case should be dismissed.

## **6 | Conclusion.**

7       Based on the foregoing, the Debtor has not established that the Second Amended Plan  
8 meets the requirements for confirmation under §§ 1325(a)(3), 1325(a)(4), 1325(a)(6) and  
9 1325(b). The Debtor has not established that he has a regular income as required by § 109(e) of  
10 the Bankruptcy Code sufficient to fund a confirmable chapter 13 plan. Therefore, Petralia's  
11 Objection to Confirmation will be sustained and the case will be dismissed.

Dated: April 14, 2006

  
W. Richard Lee  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

United States Trustee  
2500 Tulare St #1401  
Fresno CA 93721

George S. Jercich  
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SNELLING, CA 95369

M. Nelson Enmark  
3447 W Shaw Ave  
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Craig B. Fry  
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149 Bonifacio Pl  
Monterey, CA 93940

DATED: 4-18-06

By:

Deputy Clerk